IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 180

WILLIAM L. GREENE, *Petitioner,*

v.

NEIL H. MCELROY, THOMAS S. GATES, JR., AND ROBERT B. ANDERSON

REPLY BRIEF FOR PETITIONER

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Introduction

Respondents' Brief is noteworthy chiefly for its extraordinary claim of unlimited executive power to control private employment. So broad and unwarranted is this assertion that it must be taken as an implicit concession that the action against Greene can be sustained on no lesser claim of executive authority. And the misinterpretation of petitioner's true interest—freedom from arbitrary governmental interference with his private employment relationships—is so gross as to constitute still another implicit concession that his true interest is so substantial as to be entitled to the constitutional protection of due process.

These implicit concessions emphasize the explicit admissions in Respondents' Brief. These explicit admissions, which are alone enough to require the reversal of the judgment below, include the following;

(1) Greene has standing to vindicate his rights. (Brief, p. 29)

(2) Greene's loss of employment was caused by the denial of access to classified information. (Brief, p. 30)

(3) Respondents claim the authority thus to deprive a citizen of private employment on the basis of personal doubt of his loyalty arising from uncorroborated suspicions (Brief, p. 44)—a doubt which may be fully consistent with the likelihood that the employee is in fact both loyal and discreet. (Brief, pp. 56, 57)

(4) That Greene has not been protected by procedural requirements "normally considered basic elements" of due process. (Brief, p. 64)

(5) No statute explicitly authorizes such an action by the respondents. (Brief, p. 23)

In support of their novel claims of unlimited power, the respondents advance three basic theses:

(1) No statutory authorization is required, because the control of "military secrets" is an inherent power of the executive. By inference, this thesis rests upon the assertion of proprietorship of the information by the Government.

(2) Respondents have exercised the right of the Government as the owner of property, and the Government is not subject to any limitation in its control of

(3) Since the Government has an unlimited discretion in the control of its property, Greene is not entitled to the rudiments of a fair hearing.

The keystone of the Brief for the Respondents is the assertion that the classified information is the property of the government, the arbitrary control of which—at least in the absence of a statutory limitation—is vested in the executive. This reply is devoted to a demonstration of the fallacy of this basic premise and the resulting untenability of the conclusions deduced from it.

I. Respondents Have Been Granted No Power to Control Private Employment Through the Arbitrary Exercise of Proprietary Rights of the Government.

The respondents, throughout their brief, have framed the issue before the Court in terms of the authority of the Government, as an owner, to exercise the authority of an owner over its own property.

The issue presented by this case is, rather, the question of power of officers of restricted authority to exercise proprietary rights of the Government in a manner conceded to cause serious injury on the basis of undefined and uncorroborated suspicion.

Whether such authority could be delegated to any official is a question which need not be answered, because Constitutional authority must be granted either to the Congress or to the President, and neither has delegated it to the respondents.

Since it is admitted that respondents do not receive the right to injure citizens in their private employment from the Congress, (Brief, p. 23) the validity of the assertion of power depends upon whether the

Constitution grants power to the President of unrestricted control of the property of the United States, insofar as it consists of military information. If so, has the President, in fact, delegated this authority to the respondents?

Both of these questions must be answered in the negative.

The new doctrine that the Constitution has granted, as a part of the executive authority or the command function of the military the right to control private contract relationships of citizens must be rejected. It may be unfair to categorize this doctrine as the beginning of a dictatorship, but it is not harsh to call it a step in that wrong direction.

It is obvious that the respondents are actually asserting control over industrial employment which extends beyond the limits attributable to any valid claim[1] The requirement for clearance is not limited to those

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[1] For example, the Executive Order on which the respondents purportedly rely provides, "Classified security information shall not be desseminated . . . by any person or agency having access thereto or knowledge thereof . . . even though such person or agency may have been solely or partly responsible for its production." Insofar as there can be a property right in knowledge, the proprietorship must necessarily be in the creator or discoverer of that knowledge. With the legislative power to control the use of this, or any other, property in the public interest, we need not be here concerned. The executive order purports to control the use of property even against the person in whom the natural right of ownership reposes. Such regulation must be based on legislative and not executive power. Nor is this merely an academic issue in this case. The story of the electronic flight simulator (R. 315) shows that whatever information the Navy possessed regarding this instrument of war was of little practical value until this engineer—now denied employment by the Navy—made it useful by the application of his mind, knowledge, and labor.

who may have occasion to be given classified information by the military departments. Every officer of a corporate contractor must apply for and receive clearance. 32 CFR § 72.8 (1955). Many corporate officers can perform their duties without any knowledge at all of the secret information used by the corporation.

These considerations amply demonstrate the unrealistic and insubstantial justification upon which the respondents rely as support for their claim over the livelihood of literally millions of American citizens in all branches of industry.[2] But such confusions on the part of the respondents may be pretermitted in the light of the concession that there is no statutory authority for the regulations under which respondents claim they are acting. The authority to exercise the proprietary rights of the Government has not been vested in the President. On the contrary, it is expressly vested by the Constitution in the Congress. Article IV, Section 3, expressly provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States; . . ." That the term "other Property" is broad enough to include all of the possessions of the government, and not merely real or tangible personal property, is clear. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 330 331; Story on the Constitution, §§ 1325, 1326. Since the Congress concededly has not authorized the use of the property of the Government as a means by which administrative officers can interfere in the priv-

[2] The extent to which this system of control has proliferated throughout the structure of American society is demonstrated in detail by the brief of the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* in Taylor v. McElroy, No. 504, October Term, 1958.

ate contract relationships of citizens, it follows that the respondents lack the authority they claim.

Whether the respondents claim some inherent authority arising from military needs in an emergency is not clear. Such inherent power has never been recognized by this Court. A claim of unlimited executive authority over the livelihood of citizens simply does not square with the basic constitutional principles of limited and separated powers.

Two recent attempts to claim inherent authority of the President as a justification for administrative interferences with the rights of citizens have been rejected by this Court.[3]

In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, it was urged that the President possessed inherent authority to seize steel mills because of their vital connection with the supply of war material. In *Kent* v. *Dulles*, 357 U.S. 116, it was argued that the traditional discretion of the President in foreign affairs authorized his act in depriving a citizen of the right to travel abroad. In both of these cases, this Court rejected the claim of inherent authority. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, the Court said (343 U.S. at p. 867):

> The order cannot be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war.

[3] The rejection of inherent Presidential control of Governmental property is implicit in the reasoning of this Court in United States v. Midwest Oil Co., 236 U.S. 459. There, although there was no express statutory authority for the act of the President in with-

Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

In *Kent* v. *Dulles*, 357 U.S. 116, 129, this Court, on the authority of the Youngstown case, flatly stated that if the liberty of travel is to be regulated, that regulation must be pursuant to the law-making power of Congress. The respondents concede that their action deprived Greene of private employment, a right which obviously does not rank below the right of travel or the right of possession of one's property. If the right of seeking a livelihood in the common occupations of mankind is to be regulated, it must be pursuant to the law-making power of Congress.

But the respondents also assert that Congress has impliedly ratified the action of the respondents in establishing the Industrial Security Regulations. For this assertion, they rely upon the doctrine of legislative ratification through appropriations. This doctrine has no application to the acts of the respondents which are challenged in this case. An essential of any ratification is that there be knowledge of what is being done. There is, so far as petitioner is aware, nothing which would support the conclusion that Congress has

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drawing government lands from entry, the Court was meticulous in spelling out a legislative ratification of his authority from the non-action of Congress over a period of almost a century. Consequently, the act of the President was supported by a legislative grant of authority, and not any inherent power of the executive.

been fairly advised of the working of the Industrial Security Regulations or has appropriated money for their support.[4]

But there is no need to base a determination of Congressional intention upon evidence as unconvincing as that presented by the respondents. The intent of Congress may be read with much more ease from the fact that it has in fact provided comprehensive machinery for the exclusion of suspected subversives from defense facilities,[5] but it has not turned this delicate task over to the military departments. *Internal Security Act of 1950,* Public Law 831, ch. 1024, 64 Stat. 989, 50 U.S.C. §§ 781-798. The careful limitations and the full judicial type of procedure set forth in this Act can be interpreted only as

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[4] The single citation in support of the fact of Congressional knowledge in the Respondents' Brief is to *Hearings before the Subcommittee on Department of Defense Appropriations for 1956 of the House Committee on Appropriations,* 84th Cong., 1st Sess., 774-81 (1955). This discussion concerned an attempt of the Defense Department to secure funds for the payment of wages lost on account of denials of clearance. It is noteworthy that the appropriations act does not contain any provision of the kind sought by the Department. But perhaps more important is the assurance given by the Department's witness that no clearance was denied without an opportunity for "a fair hearing". Subsequently, the Committee was told that an employee receives a "full hearing." *Ibid,* p. 775. This legislative material supports the contention of the petitioner's brief (pp. 50-56) in Taylor v. McElroy, No. 504, this Term, that Congress has never approved the procedures here challenged. If this more restricted argument is not implicit in our demonstration of lack of legislative ratification of any part of the Industrial Security program, we now urge the less broad argument made by Taylor.

[5] Examples of the vigorous use by Congress of the criminal law in the dealing with the problem include those cited by the Respondents in note 7, page 26, of their Brief.

a legislative balancing of the needs of the military and of the rights of citizens. The military authorities are without power to revise the determination of Congress by extending the scope of the program and denying the procedural protection Congress provided for the affected citizens.

Even more important is the fact that upon the one occasion on which the question of authorizing the issuance of regulations such as the Industrial Security regulations came before the Congress, the authority was not granted. Instead, Congress provided for the establishment of a Commission to study the problem with a view of accommodating the legitimate needs of national defense to the constitutionally protected rights of the citizen. House Report No. 2280, House of Representatives, 83rd Congress, 2d Sess., p. 3. Perhaps the final evidence of the untenability of the respondents' claim of Congressional ratification lies in the fact that the Commission appointed by the President and the presiding officers of the two houses of Congress concluded that Congressional action was necessary for the validity of the regulations, *Report of the Commission on Government Security*, pp. 249, 250 (1957), and recommended the abolition of the Industrial Security program in its present form. *Ibid.*, p. 266.

Even were legislative action not a prerequisite, the acts of the respondents would be unauthorized.

Nowhere has the President delegated, in any reasonably specific terms, the authority to use the Government's property and buying power to deprive a citizen of his livelihood. This is especially so when the action is based on an alleged doubt admittedly fully consistent with a determination that the citizen injured is in

fact both loyal and discreet. The principle of construction affirmed by this Court in *Kent* v. *Dulles*, 357 U.S. 116, 129—that delegated powers which curtail or dilute basic rights will be narrowly construed—applies with equal force to an attempted delegation of the executive power, if such a power could conceivably be found to exist. Cf, Mr. Justice Frankfurter, dissenting in *Jay* v. *Boyd*, 351 U.S. 345, 372.

II. The Protection of Procedural Due Process Is Guaranteed by the Constitution to One Who, Like Greene, Has Arbitrarily Been Deprived of the Basic Right of Earning a Living.

That action of the respondents of which Greene complains in this action caused his discharge from the position which he had achieved by merit and in which he had served his employer and the Government well is no longer open to dispute, because it is conceded by the respondents. In their brief (p. 30), they say:

> We do not deny that the withdrawal of petitioner's security clearance operated, as a practical matter, to cause him to lose his position with ERCO, since his lack of access to classified information terminated his usefulness to the company. It may also be true, as petitioner alleges, that he has been seriously hampered by that action in obtaining other work for which his talents are particularly suited.

Nonetheless, the respondents assert that he is not entitled to have a court examine the legality of the action taken, or the rationality of its asserted basis, because, as they pose the question, all that the Government did was to refuse to disclose military information in its custody, for the protection of which it was responsible.

The issue, as we have pointed out, is *not* what the Government, as an incorporeal entity, may do, but whether its finite agents may exercise an unlimited and unreviewable discretion to control the livelihood of citizens through the use of the Government's purchasing power and its use of property which it claims to own.

Such authority must either have no beginning or it must have no end. In the view of the respondents, the selection between the two alternatives is simple: the power has no end, for, as they assert, their action "may, if necessary, be based on no more than doubt and : . . is not judicially reviewable." (Brief for Respondents, p. 44).

The respondents seek to justify this novel assertion of unlimited power because, as they say, they are dealing with the proprietary interests of the Government, which, they suggest, is like every other owner of property, and therefore able to deal with its own property in any way in which it chooses. At the out-set, it should be noted that this is an overstatement of the rights of property ownership, because ownership of property does not justify its use to inflict unwarranted injury on another. Traditionally, an interference with employment contract relationships has been an injury against which equity will act. Cf, e.g., *Lumley* v. *Gye*, 2 Ellis & Blackburn 216 (Queen's Bench, 1853).

Even were this not so, it should be noted that Green's complaint is not of the acts of the Government, but is of the acts of the respondents which have caused him injury. Unless those acts were authorized—and it is clear that they were not—they can not properly be described as acts of the Government.

But, more important in the determination of the issues before the Court, is the fact that the Government is subject to restrictions not imposed on a private property owner. As was said by Mr. Justice Jackson, concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 646:

> The third clause in which the Solicitor General finds seizure powers is that "he shall take Care that the Laws be faithfully executed * * *." That authority must be matched against the words of the Fifth Amendment that "No person shall be * * * deprived of life, liberty, or property, without due process of law." One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.

One basic limitation on the authority of any governmental official is that he shall not exercise it in a way that is patently arbitrary. *Wieman* v. *Updegraff*, 344 U.S. 183, 192. The respondents seek to distinguish Wieman and similar cases upon the ground that the due process clause creates an affirmative right not to be discriminated against on the basis of an "invidious classification", a category they apparently limit to discriminations on the basis of race, religion, or politics. (Brief, pp. 36, 37) That the Constitution is offended by such discrimination, we have no doubt. But the respondents' attempt to constrict Constitutional protections to that one kind of arbitrary action misreads this Court's decisions as well as the purpose of the Bill of Rights. The reason for the Bill of Rights was distrust of power; the remedy was sought in constitu-

tional limitations against the abuse of power. *Weems* v. *United States,* 217 U.S. 349, 373.

It is difficult to conceive of any administrative action more arbitrary than using a patently unfair process to determine individual adjudicatory facts without evidence,[6] and then denying a citizen his right to a livelihood. Nor can the respondents shield their action by claiming to have acted upon the basis of a record which they believe to be right, but which they cannot submit to public testing.[7] As Mr. Justice Frankfurter has said (concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, at p. 171, "That a conclusion satisfies one's private conscience, does not attest its reliability. * * * [S]elf-righteousness gives too slender an assurance of rightness."

Any arbitrary action by any governmental officer is forbidden by the due process clause. An action which is not based upon findings is patently arbitrary. Findings which rest upon no firmer basis than inferences

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[6] The respondents lay great stress upon the allegation that Greene conceded facts which justify their action. This is simply not an accurate description of what the record shows Greene said. One example will suffice. Greene has not denied, as he has no reason to deny, that he was married to Jean Hinton Greene. But an unfortunate marriage cannot be a reasonable ground for a doubt of his loyalty. The important allegations are that Jean Hinton Greene was "an ardent Communist" and that Greene agreed with her views. The record is replete with evidence which refutes these statements.

[7] Mr. Justice Frankfurter, dissenting in Jay v. Boyd, 351 U.S. 345, 373, has given an unmistakable warning against reliance upon secret information of the nature admittedly used by the respondents as the basis of their injury to Greene. He said, "We can take judicial notice of the fact that in conspicuous instances, not negligible in number, such 'confidential information' has turned out to be either baseless or false. There is no reason to believe that

drawn by subordinate government officials[8] from untested hearsay are the equivalent of no findings at all.

Conclusion

The entire argument of the respondents rests upon doubtful conclusions drawn from the tenuous premise that the respondents have done no more than exercise the proprietary rights of the Government. Those conclusion can be accepted only if one blinds himself to the practical and admitted realities of the situation before the Court. The acceptance of such arguments would be at least an initial step toward destruction of a basic freedom.

Respectfully submitted,

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only these conspicuous instances illustrate the hazards inherent in taking action affecting the lives of fellow men on the basis of such information. The probabilities are to the contrary. A system of administrative law cannot justify itself on the assumption that the 'confidential information' available to these inquiry officers and the Board of Appeals is impregnable or even likely to be true.''

[8] Nothing in the record indicates that any responsible officer of the Department of Defense actually had anything to do with the formulation of the statement of charges upon which the respondents lay such stress in their Brief, which is only a charge—not evidence. The alleged ''findings'' stated in the Fenton letter (R. 22-24) were made public long after the institution of this litigation, and may fairly be dismissed as self-serving declarations intended to provide support for the action by which Greene was deprived of his employment.